United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1041

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

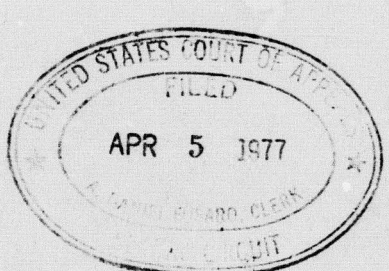
JOSEPH MARTINEZ-CARCANO,

Defendant-Appellant.

Docket No. 77-1041

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
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FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the district court's confusing and erroneous charge on entrapment -- the central issue in this case -- mandates a reversal of the judgment of conviction.

2. Whether the court's improper restriction upon defense counsel's cross-examination concerning the details of Sarmiento's conversations with appellant, her motive to cooperate with the Government, and her prior criminal acts mandates a reversal.

3. Whether the case should be remanded for an evidentiary hearing to determine whether the conditional promise of the Southern District United States Attorney's office to recommend a ten-year sentence for the Government witness was dependent in part upon her cooperation in the MCC escape case.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lee P. Gagliardi) rendered on January 5, 1977, convicting appellant Joseph Martinez-Carcano, after a jury trial, of aiding and abetting bribery and conspiracy (18 U.S.C. §§201(c), 2, 371). Appellant was sentenced to six year's imprisonment on the bribery count, with a three-year concurrent term for conspiracy.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel for appellant, pursuant to the Criminal Justice Act.

Statement of Facts

On October 15, 1976, appellant Joseph Anthony Martinez-Carcano, an inmate at the Metropolitan Correctional Center,

two prison guards at MCC, and three others were indicted and charged with conspiracy, bribe-taking, and aiding an escape. The charges arose from an escape plan purportedly designed to free from confinement one Yolanda Sarmiento, an "international narcotics dealer," who was then cooperating with the Government (T.26*). According to the Government, appellant Martinez broached the idea to Sarmiento, who agreed to the plan and reported it to the Government, which decided to allow the plan to continue to completion (T.28). Appellant did not deny his involvement in the escape, but alleged that he was entrapped by Sarmiento. Appellant stated that, in addition to offering money if her escape could be arranged, Sarmiento gained appellant's sympathy by telling him, inter alia, that she had previously been tortured and that she would go insane if she could not escape. Appellant resisted her pleas for weeks but finally relented and informed her of a guard willing to assist the escape. The plans progressed, with appellant admittedly playing a significant role thereafter (T.42-47).

Prior to trial the two corrections officers -- Philip and Wahid -- and the three other co-defendants entered guilty pleas to conspiracy and aiding the escape. Accordingly, on December 16, 1976, appellant appeared for trial before Judge Gagliardi.

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*Numerals in parentheses preceded by "T" refer to pages of the trial transcript.

A. The Government's Principal Witness

Yolanda Sarmiento, the principal witness for the Government, a 47-year-old resident of Argentina acknowledged by the Government to be a major "international narcotics dealer," was extradited to the United States in May 1976 to face federal narcotics charges (T.50-51). Outside the jury's presence, the Government disclosed that as of Sarmiento's extradition, there were four federal indictments outstanding against her -- three in the Eastern District, one in the Southern District of New York (T.7-8). In Indictment No. 1260, in the Eastern District, Sarmiento was charged with conspiring to violate the narcotics laws by, inter alia, shipping 60 kilograms of heroin from Argentina to the United States. She was also charged in six substantive counts with the importation of three to 18 kilograms of heroin and cocaine, with possible sentences for conviction on these offenses of well over 100 years. Moreover, in two other Eastern District indictments -- 74 Cr. 492 and 74 Cr. 493 -- Sarmiento was also charged with conspiracy to import heroin.

Finally, Indictment 74 Cr. 472, filed in the Southern District of New York, charged Sarmiento with conspiracy to import heroin and cocaine, inter alia, by importing 1/6 ton of heroin in seven separate air freight shipments. All in all, the Government charges, even if only partially true, made Sarmiento one of the world's largest narcotics dealers. (The Sarmiento indictments are included as "F" to the separate appendix to appellant's brief.)

In November 1976, Sarmiento pleaded guilty to one count of Indictment 74 Cr. 492 in the Eastern District of New York (T.8).

At trial, the United States Attorney's office for the Southern District of New York represented that Indictment 72 Cr. 1260 had been superseded by 74 Cr. 492 -- the indictment to which Sarmiento pleaded guilty--and that Indictment 74 Cr. 472, the Southern District indictment, would not be prosecuted because it involved the same acts as those to which she had pleaded (T.8, 83). The Government noted that a plea agreement had been reached, "probably months before" the MCC escape at issue here, to dismiss the other two Eastern District indictments in return for Sarmiento's cooperation and a plea to Indictment 72 Cr. 492, with the Government to call any further cooperation by the witness to the attention of the sentencing judge. Accordingly, it was the Government's view that the proper scope of cross-examination on Sarmiento's motive to cooperate in the MCC matter was limited to any inducement the witness might be receiving on the sentence of the single indictment to which she pleaded, and that cross-examination on the other indictments was inappropriate (T.82-83, 89).

At trial, on direct examination, Sarmiento admitted having entered a guilty plea to narcotics conspiracy, upon which she was awaiting sentence (T.51). Sarmiento also admitted a prior arrest in 1962 for shoplifting, a crime for which she was never punished because she fled prosecution, and which

occurred after she entered the United States on a passport with a false name (T.52, 102); a conviction in 1965 for shoplifting, in which she again used a false name (T.52, 105); a guilty adjudication in 1967 for shoplifting, which again resulted in no formal disposition because the witness, yet again using a false name, fled to Argentina prior to sentencing (T. 53, 108); and an arrest for narcotics conspiracy in 1970, which again did not result in a trial because Sarmiento, using still another false name, fled to Argentina, forfeiting $100,000 bail (T.52, 109).*

B. The Government's Case

Sarmiento testified that almost immediately after her extradition and arrival at the Metropolitan Correctional Center, she began cooperating with the Government. At the same time, the witness became acquainted with appellant Martinez, an inmate at MCC, when he brought her a card with a message from another prisoner, one of Sarmiento's former narcotics clients. Sarmiento and Martinez continued to meet and, over a period of time, became friends, conversing almost every day on the roof

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*Incredibly, the witness claimed to have left the country this final time on the advice of her attorney (T.112). According to Sarmiento, she never stayed in the United States for more than three months, and entered this country only those times she was arrested. On cross-examination, the court sustained objection to counsel's questions inquiring how Sarmiento had managed to post $100,000 bail, and whether she was aware, on that occasion, that she was obliged to appear in court (T. 118-119).

area of MCC. Sarmiento testified that among other matters she discussed with Martinez the brutal treatment she had suffered at the hands of authorities in Argentina, the assassination of her son in that country, and the indictments against her (T.53-57, 172-177). However, Sarmiento denied that she had ever told appellant or anyone else that there was a plot against her. Counsel then inquired whether she had ever spoken to a Dr. Dolan and whether, during that conversation, she had stated that she had been kidnapped by political enemies. An objection to the defense question was sustained (T.144-146). The court also sustained objection to questions on cross-examination concerning Sarmiento's stories, admittedly told to appellant, of the manner in which she had been kidnapped (T.144) and specific facts concerning Sarmiento's allegations to appellant of the treatment she suffered in Argentina (T.176).

Sarmiento testified that, after some two months of these conversations, appellant one day volunteered to her that, if she wished, she could give someone money and escape from jail (T.57). She alleged that the next day Martinez asked her if she had thought about his suggestion; he claimed that there were officers in need of money who could be bribed to help her escape. The conversation continued on the following day, appellant repeated his proposal, and stated that he had talked to an officer who had agreed to take Sarmiento out of prison for $50,000 (T.58-59).

According to Sarmiento, she reported this conversation to

her attorney, Howard Jacobs, who arranged for a meeting with Mr. DePetris of the United States Attorney's office for the Eastern District, the jurisdiction of three of the narcotics conspiracy indictments pending against Sarmiento (T.58-59). As a result of the meeting with the United States Attorney's office, Sarmiento returned to MCC and continued negotiating with appellant. Sarmiento told appellant that she would agree to pay for the escape, but only $25,000. Appellant said he would consult with the others. The following day he returned and informed Sarmiento that they would agree to the plan under the condition that she pay $5,000 prior to the escape. Sarmiento told appellant she would let him know later. Following a discussion with William Tendy, Executive Assistant United States Attorney for the Southern District of New York, Sarmiento returned to MCC and the plan continued, enlisting a second guard. On about September 28, 1976, and October 1, 1976, Sarmiento met with appellant, who gave her clothing for the escape and prepared a bogus identification card. Sarmiento also testified to one meeting with Martinez and two guards, Officers Wahid and Philip. Since Sarmiento spoke no English and Wahid and Philip no Spanish, Martinez acted as interpreter (T.59-61, 66-73).

On October 4, the escape occurred. The police arrested Sarmiento and her companions one block from MCC* (T.74-78).

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*Testimony relative to the escape was also given by undercover agent Rafael Rodriguez, who described, inter alia, the

On cross-examination of Sarmiento, defense counsel tried to explore, inter alia, the circumstances underlying Sarmiento's guilty plea of narcotics conspiracy by asking whether, on September 20, 1972, she had shipped 60 kilograms of heroin; whether, on October 26, 1976, she had shipped 26 kilograms of heroin; and whether in 1970 she had imported 1/6 ton of heroin (T.121, 147). These allegations were contained in 72 Cr. 1260, the indictment allegedly superseded by 74 Cr. 492, to which Sarmiento had entered her guilty plea, and Indictment 74 Cr. 472, the Southern District indictment that, according to the Government, contained the very same acts included in the indictment to which Sarmiento had pleaded. Counsel stated that these questions were proffered both to impeach Sarmiento's credibility and to explore her motive to cooperate and testify falsely, since the nature of the charges might have affected her motive to cooperate (T.164-165). The court sustained the objection on the following ground:

> I will sustain the objection, Mr. Gallina. You ought to know from my rulings that you cannot do that. I will permit you to go into what indictments she has been charged with, and so forth, but not what is contained in the indictment, what they charge

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(Footnote continued from the preceding page)

initial payment of $5,000 -- $2,000 of which went to Officer Philip, $2,000 to Officer Wahid, and $1,000 of which was kept by appellant's wife (T.213, 223) -- and appellant's role in the escape plan (T.224, 242, 245, 252, 255, 261). Several transcripts of conversations corroborating Rodriguez' testimony were also admitted.

> or what crime they charge and what penalties she subjected herself to.
>
> (T.122).

Moreover, Sarmiento expressed total ignorance of the enormous penalties to which she was liable on the four indictments (T. 123, 125), or the specific counts in the indictment against her (T.126).

In cross-examination, Sarmiento did remember that there were several indictments outstanding against her, that if she pleaded guilty to one, the others "might" be dismissed, and that this agreement had been reached from the "moment" she was brought to the United States (T.125, 129; but see 129 (other indictments "would" be dismissed)). Sarmiento stated that she had pleaded guilty to a crime with a 20-year maximum and five-year minimum sentence and that her cooperation in this case would be called to the attention of the sentencing judge (T.54). When Sarmiento denied that any other promise was made with respect to her plea, she was reminded of a sequence in her plea hearing in which it was agreed that if she supplied additional cooperation to the Southern District United States Attorney's office, both the Southern and Eastern District offices might recommend that her sentence be no greater than 10 years' imprisonment, and further, that if the Southern and Eastern District offices disagreed, Sarmiento might withdraw her plea (T. 130-138). Despite her frequent acknowledgments during the plea hearing that she understood the promise, Sarmiento maintained

her position that she did not know of this additional inducement (T.138-141).

To bolster Sarmiento's credibility, the Government then called David DePetris, chief of the narcotics section of the Eastern District United States Attorney's office, and the person who arranged Sarmiento's plea bargain. DePetris testified that there were five -- not four -- indictments returned against Sarmiento, one of which, a 1971 indictment, was superseded. He noted, however, that the agreement to accept Sarmiento's plea to one indictment to cover all Eastern District indictments occurred before the Eastern District was aware of the MCC escape plan (T.181-183). Mr. DePetris also testified to an additional promise by the Southern District to recommend that a sentence of no more than 10 years in the event Sarmiento furnished "additional" cooperation, with a further condition that if the Eastern District United States Attorney's office was unable to agree to this recommendation, Sarmiento would be allowed to withdraw her plea. However, DePetris claimed that this "additional cooperation" to the Southern District was completely unrelated to Sarmiento's cooperation in the MCC escape or her testimony at trial (T.183-185). The court sustained objection to defense questioning as to the nature of this "unrelated" cooperation (T.198).

While DePetris' entire testimony involved his, rather than Sarmiento's, interpretation of the plea agreement, when defense counsel inquired as to the maximum penalties Sarmiento was

facing in the Eastern District indictments, the court sustained objection,* deciding that "[w]hat is relevant here is what her understanding of what she was facing, not what the actual facts were" (T.187).** On re-direct, DePetris was then permitted to testify, over objection, that after discussions with unspecified parties, it was "the understanding" that the indictment returned against Sarmiento in the Southern District would be dismissed. Mr. DePetris also testified that the facts of the Southern District overlapped substantially with the Eastern District charges (T.202).

C. The Defense Case

While not denying his role in the escape, appellant Martinez-Carcano alleged that he had been entrapped by Sarmiento. Appellant became a prisoner at MCC on June 5, 1975, and became active in a wide variety of inmate programs. He was a floor representative, he instituted an educational program for teaching English to Spanish-speaking inmates, he created a law library program, he contacted publishing companies for donations of books to the institution, he translated materials for Spanish-speaking inmates, and he arranged for chartered bus trips for families of inmates at Lewisburg (T.397-405, 461-465).

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*Eventually, DePetris did testify to the length of some of the sentences in 72 Cr. 1260 (T.191).

**Appellant unsuccessfully attempted to offer the indictments in evidence (T.201).

As a result of these activities, appellant achieved a trustee status, allowing him to visit most areas of MCC. Accordingly, he often made deliveries of newspapers, books, and messages to different inmates (T.470-471).

Appellant became acquainted with Sarmiento after an 11th Floor inmate gave him a card to deliver to her (T.408, 471-472). As he gave her the card, appellant noticed that Sarmiento had a number of bruises on her face and arms. He asked Sarmiento if there was any problem, and she replied that she was all right, but in pain from the bruises (T.409).

Sarmiento stayed to herself for a few days, but eventually met with appellant more regularly during their roof recreation period (T.410-411). Appellant helped Sarmiento with translation, gave her change for the telephones, and delivered her newspapers. As time went on, appellant got to know Sarmiento better and became very fond of her (T.477).

As her conversations with appellant went on, Sarmiento told appellant that she had been beaten, tortured, and raped for eight days on end while she was in Argentina (T.412). She claimed that her son had been kidnapped and killed. She claimed that her husband had escaped from the West Street detention center, that she was facing the rest of her life in jail, and that the Government would not stop torturing her because they were going to pay her back for her husband's escape (T.413-415).*

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*However, the court precluded all direct examination concerning whether appellant had attempted to verify any of these allegations by contacting Sarmiento's co-defendants (T.415-416).

During these discussions, often accompanied by a great deal of crying, Sarmiento also related how she had jumped bail and was facing state charges, and how she was facing income tax charges for having deposited $320,000 in banks in New York when she was in the city (T.480).

By June, during one of Sarmiento's crying sprees, she told appellant that she was concerned about her children and that she would pay anything to escape to be with them (T.417, 418). At first appellant did not take her seriously, since Sarmiento's complaints were not totally unlike those he had heard from other inmates. However, unlike other inmates, Sarmiento persisted in her pleas for three months (T.418), saying that she would pay anything for her freedom. Finally, she told appellant that she was on the verge of insanity, unable to sleep, and that all she could see was the rest of her life in jail. Again, Sarmiento urged appellant to help her escape (T.418, 481). Moved by her pleas, appellant agreed to see what he could do, although he explained to her that, being an inmate himself, he did not have the ability to let her out. Appellant was promised no money for his assistance (T.418-419, 481).

Appellant told Sarmiento about a prison guard he knew who was in need of money. Sarmiento urged appellant to contact the guard -- Officer Philip -- which appellant did, returning to Sarmiento with the information that the guard would help. Further trips by appellant to Philip provided Sarmiento with the information that Philip would conduct the escape for her for

$25,000 (T.422, 483-486). Eventually, Philip decided that he could not arrange the escape alone and enlisted the help of a second officer, Yasin Wahid (T.422-423).

The agreed fee of $25,000 was to include $15,000 to Wahid, $8,000 for Philip, and $2,000 for the driver of the getaway car and "expenses." Down payment of $5,000 was made prior to the escape, with $2,000 going to each corrections officer, and $1,000 to appellant's wife for expenses (T.424, 428-429).* Appellant supplied Sarmiento with a map (T.508). Several days before the escape, appellant met with and photographed Sarmiento and had her try on the clothes to be used (T.511-513).

On direct examination, appellant admitted prior arrests in 1972 and 1973 in Puerto Rico for possession or sale of one and three ounces of cocaine, charges which did not go to trial when appellant absconded, forfeiting bail (T.390-391). Appellant was later arrested in New York for a cocaine offense, for which he received three years' imprisonment, with a five-year parole term imposed on one of the Puerto Rico offenses (T.394). In contrast to the cross-examination of Sarmiento, appellant was thoroughly cross-examined on the facts underlying all three cocaine offenses, only two of which resulted in convictions (T.444-459), as well as appellant's alleged bail offense.

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*Eventually the materials -- camera and clothes -- to be provided for the escape were furnished, and were paid for by Sarmiento's brother, actually a government agent (T.505-507). Appellant's wife was left with the money, which appellant urged her to spend, and which, apparently, she did spend (T.507-508).

Armando Cardona, a former MCC inmate, demonstrated that appellant was not the only inmate solicited by Sarmiento to help her escape. Cardona testified that while he was at MCC, Sarmiento approached him, informed him that she had a lot of money, and solicited his assistance in aiding her escape (T. 334). Cardona told Sarmiento that he did not want to talk about it because he was doing a lot of time (T.333).

The defense also called five witnesses employed by or associated with MCC, who testified to appellant's extraordinary institutional record, including the wide variety of activities in which appellant participated and the many projects he had initiated (T.547-548 (arranging interviews, making suggestions for transportation); 551-555 (assisting inmates); 557-563 (organizing classes, acting as interpreter, distribution of books, records, law books); 293-294 (recreational work)), his trusted status in the institution (T.291-292), and his excellent reputation for truth and veracity (T.302, 549, 564). However, the district court sustained objection to all questions put to one of the witnesses, Albert Carlson, to explore his opinion as to whether appellant was truthful (T.556). Accordingly, Carlson, who had an opinion of appellant's character but was unfamiliar with his reputation, was prohibited from offering character evidence (see T.307, 298, 556). The court's rationale for this exclusion was "you can't form your own opinion, it has to be the opinion of others" (T.556).

D. The Charge* and Verdict

Prior to the charge, the defense submitted a request to charge** on the issue of entrapment. The court rejected appellant's entrapment request, and announced that it would render a charge similar to that approved in United States v. Rosner (T.279-280, 620).*** In further discussions, the Government pointed out that the court should clearly inform the jurors that even if they found that appellant was approached by Sarmiento, they must decide, the burden being on the Government, whether appellant was predisposed (T.622). Defense counsel noted that this was in his proposed charge, as did the court.

The court then proceeded to charge on entrapment as follows:

> Now, if you should find beyond a reasonable doubt the conspiracy and the defendant was one of the conspirators in the conspiracy charged in the indictment, you may then consider defendant's defense of entrapment. Defendant asserts that as a defense to the charges of the indictment, that he was a victim of entrapment by an agent of the Government.
>
> The word "entrapment" is a legal term. It has a technical meaning, not that of popular speech or colloquial ordinary usage. I must therefore explain it to you as it is used in the law.

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*The complete charge is "C" to the separate appendix to appellant's brief.

**A copy of the defense request to charge is "D" to the separate appendix to appellant's brief.

***Prior to the charge, the court apparently submitted a copy of the instruction to counsel. Defense counsel made no specific objection to the charge, but stated: "I asked that the charge be submitted in the manner in which I had requested" (T.620).

A basic feature of entrapment is that the idea or design of committing the crime charged originated with a Government agent rather than with the defendant.

For our purpose here, you are to consider that Yolanda Sarmiento was an agent of the Government. Now, there are two questions to be addressed considering the defendant's entrapment defense.

The first question is whether defendant has established by a fair preponderance of the credible evidence that the Government through its agent induced him to commit the offense.

In that regard, a fair preponderance of the credible evidence means the greater part of the evidence you find believable. That phrase refers to the quality of the evidence, the weight and the effect that it has on your minds.

If in the first instance the defendant meets the burden of proving Government inducement, a term which I will explain to you shortly, the burden is then shifted to the Government to prove the defendant's predisposition to commit the crime beyond a reasonable doubt.

I will define predisposition for you in a moment.

It is not simply this defense of who spoke to whom first, but this is the legal definition of the term of entrapment as I am giving it to you.

The fact that the Government official or Government agent merely afforded an opportunity to one who is ready and willing to violate the law when the opportunity presents itself, does not constitute entrapment. However, in their efforts to enforce the law, Government agents may not entrap an innocent person who except for the Government's inducement would not have engaged in the criminal conduct charged.

Entrapment occurs only when the criminal conduct was the product of the creative activity of the agent, that is, if it was instigated, incited, induced or lured an otherwise innocent person to commit a crime and to engage in criminal conduct. If that occurs, the Government may not avail itself of the fruits of this instigation. In this regard, defendant asserts he was induced to violate the law by the activities and communications of Yolanda Sarmiento who was a Government agent.

As I have indicated to you previously, the defendant has the burden of establishing by a fair preponderance of the credible evidence that this was so, but that again does not end the question because if that is so, then the question is whether or not the defendant was ready and willing to violate the law when the opportunity presented itself in which case there is no entrapment.

If the prosecution has satisfied you beyond a reasonable doubt that the defendant was ready and willing to commit the offense charged and was merely awaiting a favorable opportunity to commit them, then you may find that the Government did no more than furnish a convenient opening for the criminal activity in which the defendant was prepared to engage.

In such circumstances you may find that the Government's agent or informer has not seduced an innocent person, but has only provided the means for the defense to effectuate or realize his own then existing purpose.

In other words, the defendant was then predisposed to commit the offense.

On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant would have committed the offense charged without the Government's inducement, then it is your duty to find him not guilty.

Now, in connection with the entrapment

> defense, it is defendant's contention that Yolanda Sarmiento entrapped him into committing the acts charged in order to benefit herself in terms of receiving a lenient sentence in cooperation with the Government. Defendant's position is based on the assumption that the more Sarmiento did as an agent for the Government, that is, the more cases she created for the Government, the greater her expectation would be for lenient treatment for herself by the Government.
>
> (T.645-649; emphasis added).

Following the charge, defense counsel objected to the court's statement concerning "who spoke to whom first," alleging that it was an important element of an entrapment charge if the approach was made first by Sarmiento (T.672). The court denied that and all other defense requests.

The jury commenced deliberations at 3:30 p.m. on December 21, 1976. Only 25 minutes later, the jury returned, requesting that the court repeat its definition of entrapment. The court then charged as follows:

> The defendant asserts as a defense to the charges that he was the victim of entrapment by an agent of the Government. The word "entrapment" that I have just used is a legal term. It has a technical meaning, not that of popular speech or colloquial ordinary usage. Therefore I shall explain to you the meaning of entrapment as it is used in the law.
>
> A basic feature of entrapment is that the ideal design of committing the crimes charged originated with a Government agent rather than with a defendant. In this connection, I charge you for the purpose of considering the defendant's claim of entrapment, you are to consider Yolanda Sarmiento as an agent of the Government.

There are two questions to be considered in considering the defendant's entrapment defense. The first question for you to determine is whether the defendant has established by a fair preponderance of the credible evidence that the Government through its agent, namely, Yolanda Sarmiento, induced him to commit the offenses. A fair preponderance of the credible evidence means the greater part of the evidence you find believable. The phrase refers to the quality of the evidence, the weight and the effect it has on your mind.

If the defendant meets the burden of proving Government inducement, a term which I will explain to you shortly, the burden Is then shifted to the Government to prove defendant's predisposition to commit the crime beyond a reasonable doubt and I will also redefine for you predisposition.

As to the meaning of inducement, the fact that the Government agent or a Government agent merely afforded an opportunity to one who is ready and willing to violate the law when the opportunity presents itself, does not constitute entrapment. However, in their efforts to enforce the law, a Government agent may not entrap an innocent person who, except for the Government's inducement would not have engaged in the criminal conduct charged. Entrapment occurs only when the criminal conduct was the product of the creative activity of the agent, that is, if the agent initiated, incited, induced, persuaded or lured an otherwise innocent person to commit a crime and to engage in criminal activity and if that occurs, the Government may not avail itself of the fruits of this instigation.

Again, I tell you, that the defendant has the burden of establishing by a fair preponderance of credible evidence that he was induced to commit the offenses.

I have used the word "predisposition". If the prosecution has satisfied you beyond a reasonable doubt that the defendant was ready and willing to commit the offenses

> charged and was merely awaiting a favorable opportunity to commit them, or one or more of them, individually or all, then you may find that the Government did no more than furnish a convenient opening for the criminal activity in which the defendant was prepared to engage.
>
> In such circumstances you may find that the Government's agent has not seduced an innocent person, but has only provided the means for the defendant to effectuate or realize his own then existing purpose. In other words, the defendant was then predisposed to commit the offense.
>
> On the other hand, if the evidence should leave you with a reasonable doubt as to whether the defendant would have committed the offense as charged without the Government's inducement, then you should find the defendant not guilty.
>
> (T.682-685; emphasis added.)

At 11:50 a.m. the following morning, the jury rendered a verdict, convicting appellant of conspiracy and of aiding and abetting a bribery, acquitting him of the escape charge (T.696).

E. The Sentences

On January 5, 1977, the court sentenced all six co-defendants convicted in the escape plot. Officers Philip and Wahid each received a sentence of two years' imprisonment. Appellant's fate was far graver: citing appellant's violation of his trusted position at MCC (T.715); the court's belief that appellant was to receive some share of the $25,000 (T.716); and appellant's prior convictions, the court imposed a six-year term for the bribery count, with a concurrent three-year term for conspiracy.

On January 21, 1977, Yolanda Sarmiento was sentenced on her plea to conspiracy to import narcotics. Prior to sentence, Assistant United States Attorney DePetris, who testified at appellant's trial, called her cooperation in that case to the attention of Judge Bramwell (see transcript of United States v. Sarmiento, E.D.N.Y. 74 Cr. 492, sentencing minutes at 8).* He also noted that the Southern District had failed to recommend a 10-year sentence for Sarmiento. In explaining this decision, Sarmiento's attorney, Howard Jacobs, stated his understanding of the plea bargain, one which differed significantly from that testified to by Mr. DePetris at appellant's trial:

> Just to clarify that a little. It was the position of the Southern District of New York that they would not make such a recommendation unless Ms. Sarmiento cooperated with regard to the escape which she did and assisted with regard to a second activity, which because of matters outside her control, never bore any fruition. It was actually the attempt to locate and return to the United States another fugitive, but that was unsuccessful. She attempted to and because of that they felt they were not obliged to make the recommendation to the Eastern District of New York, and did not.
>
> (Sarmiento sentencing minutes at 9-10; emphasis added.)

Mr. DePetris, present at the sentencing, failed to dispute Mr. Jacobs' account. The court then sentenced Sarmiento to the minimum penalty of five years' imprisonment.

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*A copy of the sentence minutes of Sarmiento is annexed as "E" to the separate appendix to appellant's brief.

ARGUMENT

Point I

THE COURT'S CONFUSING AND ERRONEOUS CHARGE ON ENTRAPMENT -- THE CENTRAL ISSUE IN THIS CASE -- MANDATES A REVERSAL OF THE JUDGMENT OF CONVICTION.

The charge in this case on entrapment failed adequately to describe the elements of this defense -- Governmental inducement and the defendant's propensity -- as well as improperly allocating the burden of proof. The court misdefined the nature of Government inducement, imparting a definition which made the term indistinguishable from the entire defense of entrapment itself. When this expansive definition of inducement was taken with the instruction that it was appellant's "burden of proving" the inducement "by a preponderance of the evidence," the court, in effect, informed the jurors that it was appellant's burden to prove entrapment by a preponderance of the evidence. The law in this Circuit, however, is indisputably to the contrary. United States v. Swiderski, 539 F.2d 854 (2d Cir. 1975); United States v. Braver, 450 F.2d 799 (2d Cir. 1971), cert. denied, 405 U.S. 1064 (1972); United States v. Pugliese, 346 F.2d 861 (2d Cir. 1965).* Since the

*Thus, if a defendant merely shows "some evidence" of Governmental initiation of the conduct, "the Government must show beyond a reasonable doubt that the defendant was ready and willing to commit the crime." United States v. Braver,

court's charge was extremely prejudicial as well as erroneous, reversal is required.

The court began its charge on the wrong foot by informing the jury that entrapment included the elements of Governmental inducement and propensity, and that, as to the former, the defendant had the "burden of proving" the issue by a "preponderance of the evidence" (T.646). Both of these quoted phrases were specifically disapproved by this Court more than five years ago in United States v. Braver, supra, 450 F.2d at 805, where this Court noted:

> ... [W]e suggest that it would be preferable for the district courts of this circuit to use an entrapment charge that does not give to the jury two ultimate factual issues to decide on two different burdens of persuasion imposed upon two different parties. While we do not specifically define this preferable charge, we suggest that there be no reference to "burden" or "burden of proof" or "preponderance of the evidence" in describing a defendant's obligation. In explaining the burden of proof on entrapment, it will be enough to tell the jury that if it finds some evidence of government initiation of the illegal conduct, the Government has to prove beyond a reasonable doubt that the defendant was ready and willing to commit the crime.
>
> (Emphasis added.)

(Footnote continued from the preceding page)

supra, 450 F.2d at 805. Moreover, Government inducement requires only "some evidence" of Government soliciting, proposing, initiating, broaching, or even "suggesting" the crime charged. United States v. Steinberg, 525 F.2d 1126, 1132 (2d Cir. 1975), cert. denied, 96 S.Ct. 2167 (1976); United States v. Sherman, 200 F.2d 880, 882-883 (2d Cir. 1952).

See also United States v. Berger, 433 F.2d 680, 684 (2d Cir. 1970), cert. denied, 401 U.S. 962 (1971); United States v. Warren, 453 F.2d 738, 744 (2d Cir.), cert. denied, 406 U.S. 944 (1972).

The charge here contained every objectionable phrase cited in Braver.* What is worse, the mention of a defendant's burden of proving Government inducement had a devastating effect, in light of the court's inability correctly to define that term.** Thus, in its main charge, after stating that the issues involved in entrapment are inducement and propensity, and after twice assigning appellant the burden of proof on inducement, the court proceeded with what appeared to be a definition of inducement indistinguishable from the defense of entrapment itself:

> If in the first instance the defendant meets the burden of proving Government inducement, a term which I will explain to you shortly, the burden is then shifted to the Government to prove the defendant's predisposition to commit the crime beyond a reasonable doubt.
>
> I will define predisposition for you in a moment.
>
> It is not simply this defense of who spoke to whom first, but this is the legal

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*Moreover, the court's definition of preponderance of the evidence, "the greater part of the evidence you find believable" (T.646), was confusing at best.

**Thus, this Court need not consider whether, in light of Braver, the giving of a preponderance of the evidence charge on Governmental inducement is now reversible error, when accompanied by a proper caution of the limited burden a defendant must meet in order to establish inducement.

definition of the term of entrapment as I am giving it to you.

The fact that the Government official or Government agent merely afforded an opportunity to one who is ready and willing to violate the law when the opportunity presents itself, does not constitute entrapment. However, in their efforts to enforce the law, Government agents may not entrap an innocent person who except for the Government's inducement would not have engaged in the criminal conduct charged.

Entrapment occurs only when the criminal conduct was the product of the creative activity of the agent, that is, if it was initiated, incited, induced or lured an otherwise innocent person to commit a crime and to engage in criminal conduct. If that occurs, the Government may not avail itself of the fruits of this instigation. In this regard, defendant asserts he was induced to violate the law by the activities and communications of Yolanda Sarmiento who was a Government agent.

As I have indicated to you previously, the defendant has the burden of establishing by a fair preponderance of the credible evidence that this was so, but that again does not end the question because if that is so, then the question is whether or not the defendant was ready and willing to violate the law when the opportunity presented itself, in which case there is no entrapment.

(T.646-648;* emphasis added).

This segment, coming immediately after the court's promise to define "inducement," was almost certainly interpreted by the jury as a proper definition of Government inducement. The court's definition, if it was of inducement, was utterly

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*The court then proceeded to define "propensity," upon which the Government bore the burden of proof.

incorrect. Governmental "inducement" or "initiation" has a limited, not expansive, meaning, and is satisfied merely by evidence of "soliciting, proposing, initiating, broaching," or even "suggesting" the commission of the crime by the Government agent (see, e.g., United States v. Steinberg, 526 F.2d 1126, 1132-1133 (2d Cir. 1975), cert. denied, 96 S.Ct. 2167 (1976); United States v. Licursi, 525 F.2d 1164, 1168 (2d Cir. 1975); United States v. Cohen, 431 F.2d 830 (2d Cir. 1970)), irrespective of the amount of pressure applied on the defendant or of the defendant's state of mind (United States v. Pugliese, supra; United States v. Sherman, 200 F.2d 880, 883 (2d Cir. 1952)). These other issues, of course, are relevant to propensity, an issue upon which the Government bears the burden of proof.

There was no need, contrary to the charge, for appellant to prove, in establishing inducement, that he was "otherwise innocent." Moreover, contrary to the court's implication, it was most relevant to the question of inducement to determine "who spoke to whom first" if the speaker broached the commission of a crime. While the court's comments were perfectly acceptable as definitions of entrapment as a whole, upon which the Government bore the burden of proof, they were utterly incorrect as statements on inducement, upon which appellant had the burden of proof. And while it is difficult to ascertain with supreme certainty whether the court intended the remarks to constitute his definition of "inducement," any doubt on this

score is removed by examining the court's re-charge on this issue.

After retiring for only 25 minutes, the jury returned and requested re-instruction on entrapment. After once again reminding the jury that appellant bore the burden of proof to establish Governmental inducement by a "fair preponderance of the credible evidence" (T.683), the court explicitly directed:

> As to the meaning of inducement, the fact that the Government agent or a Government agent merely afforded an opportunity to one who is ready and willing to violate the law when the opportunity presents itself, does not constitute entrapment. However, in their efforts to enforce the law, a Government agent may not entrap an innocent person who, except for the Government's inducement, would not have engaged in the criminal conduct charged. Entrapment occurs only when the criminal conduct was the product of the creative activity of the agent, that is, if the agent initiated, incited, induced, persuaded or lured an otherwise innocent person to commit a crime and to engage in criminal activity and if that occurs, the Government may not avail itself of the fruits of this instigation.
>
> Again, I tell you, that the defendant has the burden of establishing by a fair preponderance of credible evidence that he was induced to commit the offenses.
>
> (T.684; emphasis added).

Again, this definition is absolutely incorrect. The question of whether appellant was "ready and willing" to commit the offense charged or whether appellant was an "innocent person" is a factor that goes to determine whether he was predisposed to commit the offense. See United States v. Anglada, 524 F.2d 296, 299 (2d Cir. 1975); United States v. Riley, 363 F.2d 955, 959

(2d Cir. 1966); United States v. Sherman, supra. And there is simply no question that the jury was required to be charged that on those issues, it was the Government -- not appellant -- which bore the burden of proof. United States v. Braver, supra, 450 F.2d at 805; United States v. Greenberg, 444 F.2d 369, 371-372 & n.3 (2d Cir.), cert. denied, 404 U.S. 853 (1971); United States v. Berger, supra.

The court's charge which, as a whole, informed the jurors that it was appellant's burden ab initio to establish the entire defense of entrapment, mandates a reversal. United States v. Swiderski, supra; United States v. Pugliese, supra.

Thus, in Pugliese, this Court found plain error in an entrapment charge in which the court, inter alia, defined inducement in such a way as to suggest that the defendant had the burden of proving the existence of undue pressure, as well as mere Governmental initiation of the crime. Here, of course, the charge was far worse, for the court defined inducement to include all elements of both inducement and propensity.

Moreover, this charge cannot be saved because the court on several occasions properly charged that it was the Government's burden to prove appellant's propensity beyond a reasonable doubt. First, at no point did the court give any instruction even remotely suggesting the minimal burden necessary in this Circuit to show inducement. Moreover, it is indisputable that the court's charge that the Government had the burden of showing propensity was conditional upon appellant's first show-

ing inducement, in the improper and "expansive" sense defined by the court. Here, United States v. Swiderski, supra, 539 F.2d at 858, is directly on point. In Swiderski, the district court improperly charged that the burden was on Swiderski to prove that he did not originate the idea to commit the crime and that he would not have purchased the drugs involved in that case but for the Government's blandishments. Later, the court "corrected" the charge by noting that if the defendant had sustained his burden, the Government must prove beyond a reasonable doubt, in essence, that the defendant was predisposed. This Court found that the assigning of the proper burden on predisposition could not save the charge, since consideration of the issue was conditional upon the jury's determination of whether Swiderski had met his "burden" -- a burden improperly thrust upon him.

Appellant here requested an entirely proper charge on entrapment* -- a charge which did not include the confusing burdens of proof. Further, counsel objected to the court's charge on entrapment, contesting the court's definition of inducement. But even if counsel had not requested a proper charge and had not objected, it is clear that an error of this magnitude, affecting the burden of proof on entrapment, is "plain," mandating reversal in the absence of an exception (United States v. Pugliese, supra; United States v. Sherman, supra; cf. United

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*See Appendix "D".

States v. Robinson, 545 F.2d 301 (2d Cir. 1976) ("natural and probable consequences" charge plain error where effect is to shift burden of proof).

Finally, there can be no doubt of the devastating effect of this charge. Appellant admitted his participation in the plan; the only other question was whether he had been entrapped. The evidence as to inducement and the amount of pressure applied by Sarmiento was sharply in dispute. A proper charge on the burden of proof was essential. A proper charge not having been given, the judgment of conviction must be reversed.

Point II

THE COURT'S IMPROPER RESTRICTION UPON DEFENSE CROSS-EXAMINATION CONCERNING THE DETAILS OF SARMIENTO'S CONVERSATIONS WITH APPELLANT, HER MOTIVE TO COOPERATE, AND HER PRIOR CRIMINAL ACTS MANDATES A REVERSAL.

More than 45 years ago, the Supreme Court noted the importance and broad scope accorded cross-examination of a principal Government witness:

> Cross-examination of a witness is a matter of right. Its permissible purposes, among others, are that ... the jury may interpret [a witness'] testimony in the knowledge of his environment; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased.
>
> Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. It is the essence of a fair trial that reasonable latitude be given the cross-examiner. ... Prejudice ensues from a denial of the opportunity to place the witness in the proper setting and put the weight of his testimony and credibility to a test, without which the jury cannot fairly appraise them.

Alford v. United States, 282 U.S. 687, 691-692 (1931); (citations omitted).

Here, these well-settled principles were violated by the court. Counsel was precluded from or restricted in cross-examination on the details of some of Sarmiento's conversa-

tions with appellant, conversations forming the very heart of this entrapment case. Moreover, counsel was precluded from developing facts as critical to an exploration of Sarmiento's motive in cooperating with and in testifying favorably for the Government, as the length of sentences the witness was facing or the magnitude of the charges against her. Finally, when it came time for appellant's case, it was direct examination of appellant and his character witnesses which was curtailed. These errors, considered separately or taken as a whole, were so serious as to have deprived appellant of a fair trial.

I.

As the opening statements of counsel made clear, one of the critical issues in the trial was the nature of the contacts between appellant and Sarmiento between her arrival at MCC and appellant's agreement to assist her to escape. While the Government contended that appellant's decision to help Sarmiento was virtually spontaneous, appellant claimed that he was only induced to cooperate with the witness after months of harranguing by her which included frequent spells of crying, offers to pay money, and threats that she would go insane (T. 43, 417-418). Appellant claimed that as part and parcel of these approaches, Sarmiento told appellant many times how she had been tortured in Argentina, how she was persecuted by political enemies, and how, indeed, she was still being persecuted by American authorities (T.43, 417-419). It was crit-

ical to establish the truth of these allegations. Not only were they relevant to the question of whether it was Sarmiento who induced appellant to commit the crime (see United States v. Cohen, 431 F.2d 830 (2d Cir. 1970)), they were absolutely essential to a determination of the amount of psychological pressure applied to appellant. Since there was not a hint of evidence that appellant had ever previously planned or assisted an escape, the existence or non-existence of such pressure may well have been determinative on the issue of whether appellant was predisposed to commit the crime. See, e.g., United States v. Anglada, 524 F.2d 296 (2d Cir. 1975); United States v. Viviano, 437 F.2d 295 (2d Cir.), cert. denied, 402 U.S. 983 (1971); United States v. Pugliese, 346 F.2d 861 (2d Cir. 1965).

Thus, in cross-examination of Sarmiento, counsel inquired what Sarmiento had told appellant about her experiences in Argentina (T.144); the court, suddenly and without explanation, ruled, "I am forbidding you from getting into this. It has no relevance to this case whatsoever" (T.144). Following these rulings, at a conference outside the jury's presence, counsel explained the importance of Sarmiento's stories, further alleging that appellant had verified them by reading the accounts of what had happened to Sarmiento's co-defendants (T.152). The court ruled that while counsel could inquire as to whether Sarmiento had told him she had been tortured, counsel could not inquire as to the "gory details" (T.154-155) ("I don't think it is relevant in any way whatsoever with how she got out of

Argentina"). On the following day, Sarmiento was recalled, and counsel was permitted very limited questioning in which he elicited that Sarmiento had told appellant that she had been tortured. However, in light of the court's earlier ruling and a threat of contempt if counsel failed to adhere to the limited scope of cross-examination (T.170), the "gory details" of her story were never elicited. The court instead cut off all questions on this matter following Sarmiento's statement that she told appellant that the Argentinan police had "hit her" (T.176).

The court's ruling was erroneous. If appellant was regaled with the gory details, they were relevant, and the jury should have heard them as well in order to make a reasoned judgment as to whether appellant was predisposed to aid Sarmiento or whether he did so only after she told him stories designed to gain his sympathy.

The court also erred by restricting cross-examination concerning alleged statements uttered to appellant by Sarmiento that there was a plot against her in Argentina as a result of her political views. In the course of cross-examination, Sarmiento denied ever having told appellant that there was a political plot against her in Argentina, and she further alleged that she had never told anybody there was a plot against her (T.144-145). Counsel then inquired whether she had ever been interviewed by a Mr. Dolan and told him that "she had political enemies who had her kidnapped and brought here be-

cause she is against the regime in Argentina." The court sustained objection to this question (T.145) and to any attempt to ascertain whether Sarmiento had made a statement inconsistent with her denials (T.145-146).

The court's restriction upon cross-examination was utterly erroneous. First, even assuming that Ms. Sarmiento's statement that she had never stated that there was a plot against her was "collateral," appellant was at least permitted to cross-examine the witness as to whether she had made an inconsistent statement. United States v. Barash, 365 F.2d 395, 401 (2d Cir. 1966); 3A Wigmore, EVIDENCE, §1023 (Chadbourne rev. 1970). Here, the error was greater, for the statements were not collateral. The fact that Sarmiento had previously told a doctor of the plot against her not only impeached her claim that she had never made such a statement at all, but made it less likely that her denial that she had made such a statement to appellant was true.*

II.

Even greater restrictions were placed upon appellant's ability to cross-examine Sarmiento concerning her inducement for testifying and the prior criminal activity that made her

*Finally, it was error to exclude appellant's direct testimony of his discussions with Sarmiento's co-defendants concerning the experiences they too had suffered in Argentina (T. 412). Such evidence was offered not for its truth, but for the effect it had on appellant's state of mind, since his hearing these stories made it more likely that he would credit Sarmiento's accusations. As such, the evidence was not hearsay (see Fed.R.Evid. 801(c); United States v. Stanchich, Doc. No. 76-1407, slip op. 1277 (2d Cir., January 6, 1977)); moreover, it was also clearly relevant.

motive to help the Government absolutely compelling.

Sarmiento was no ordinary informer: On her return to the United States, she was charged in four indictments, one of which, for example, alleged that she had participated in the smuggling of 1/6 ton of heroin. In one other indictment, she was charged with one count of conspiracy and six counts of importation of heroin -- offenses which could have resulted in well over 100 years' imprisonment. At least according to the Government, their principal witness was no ordinarly seller of drugs, but was one of the world's larger drug dealers. Sarmiento testified that almost immediately upon her arrival, she agreed to a bargain whereby she would plead to a single indictment with a five to 20-year maximum term. Assuming, as the Government proffered, that the bargain was made prior to her cooperation in the MCC case, the nature of the charges against her were still relevant to determining her bias in this case, for several reasons. For example, because the criminal conduct charged against her in the other indictments could, if the sentencing judge accepted them, be taken into account in her upcoming sentencing (United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972)), the greater the allegations against Sarmiento, the greater her motive to cooperate. Moreover, the fact that Sarmiento had received substantial benefit -- in the form of a plea to a single charge to cover four indictments -- from the Government for the cooperation rendered prior to her involvement in the MCC case made her motive to continue to cooperate by giv-

ing testimony valuable to the Government all the more compelling. In exploring these relevant matters, counsel was entitled to show the charges against Sarmiento and the possible sentence, and if Sarmiento denied knowledge of the charges or sentence, counsel was free to submit other evidence to show them.

This resolution is in accord with a continuous history of decisions in this Circuit and others which recognize the critical importance of cross-examination of an informer on his or her motive to cooperate. United States v. Persico, 305 F.2d 534, 538-540 (2d Cir. 1962) ("The worse his history, the more likely extremely heavy sentences were facing him, the more he needed help from the prosecution in this case. And counsel was entitled to show ... any facts the jury might find likely to affect the probable sentence of this witness and so his motive to falsify. The power of a judge to place a limit on cumulative evidence must be used sparingly in such a situation"); United States v. Padgent, 432 F.2d 701 (2d Cir. 1970); United States v. Masino, 275 F.2d 129, 132 (2d Cir. 1960) (when a witness in a criminal case is being questioned as to his possible motives to testify falsely, a wide latitude should be allowed in cross-examination); United States v. Lester, 248 F.2d 329 (2d Cir. 1957); United States v. Dickens, 417 F.2d 958, 961 (8th Cir. 1969).

Here, appellant was precluded from submitting evidence to show the precise nature of the charges against Sarmiento and

the length of sentence she faced. Thus, following questioning of the crimes underlying one of Sarmiento's indictments, the court ruled:

> I will permit you to go into what indictment she has been charged with, and so forth, but not what is contained in the indictment, what they charge or what penalties she subjected herself to.
>
> (T.122).

While the court eventually permitted counsel to question the witness about the maximum sentences she might receive, Sarmiento denied knowledge of the penalties (T.123-124) or the counts against her (T.125), and counsel was forced, if he wished to bring out this evidence, to rely upon testimony of other witnesses or by the indictments themselves. However, counsel was hampered from developing either line of inquiry. First, the court sustained objection to questioning of David DePetris, the Assistant United States Attorney who had helped arrange the plea bargain, on the possible length of sentences in the charges in the indictments and to admission of the indictments themselves. The court's rationale for exclusion -- that the witness' perception of the sentences, and that alone, is relevant -- was incorrect, for, as already noted, the law is clear that the witness' alleged perception may be impeached by showing the actual facts surrounding a motive to testify favorably for the Government. United States v. Persico, supra; United States v. Padgent, supra. Moreover, the court's rationale was inconsistent, to say the least, since all of Mr. DePetris'

testimony had concerned the Government's view of the plea bargain, not Sarmiento's. The effect of the court's ruling was to permit the Government free latitude to show why Sarmiento had no motive to lie, and to preclude the defense from adducing evidence to the contrary.

The court erred further by completely restricting cross-examination on the narcotics activity underlying Sarmiento's plea of guilty to Indictment 74 Cr. 492. In cross-examining on this issue, appellant's questions were drawn from allegations contained in 74 Cr. 472 and 72 Cr. 1260. Since the former was alleged by the Government to contain the same acts as 74 Cr. 492, and since the Assistant United States Attorney stated in open court at the beginning of appellant's trial that prosecution of 472 would be barred by a plea to 492, on grounds of double jeopardy, and since 72 Cr. 1260 had, according to the prosecution in this case, been superseded by 74 Cr. 492, counsel's questions had a good faith basis.

The questions were also relevant. First, since this previous misconduct, had it occurred, could be taken into account by Sarmiento's sentencing judge, it was relevant in evaluating the extent of the sentence she might receive and her motive to cooperate. United States v. Persico, supra. Moreover, the conduct was admissible to impeach Sarmiento's credibility, since it was an act of misconduct relevant to her truthfulness. Fed.R.Evid. 608(d). The crimes charged against Sarmiento did not involve mere street sales of heroin.*

*Accordingly, United States v. Puco, 453 F.2d 539 (2d Cir. 1971), is inapplicable.

but a massive smuggling operation which necessarily involved deception, travel across borders, and purposeful, calculated violations of the law. "A demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity." People v. Sandoval, 34 N.Y.2d 371, 377 (1974); see Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968) (Burger, J.). In any event, since it was the Government, not appellant, which elicited Sarmiento's guilty pleas, the Government opened the door to questioning.

The necessity of permitting full cross-examination of Sarmiento is even more apparent in light of the unrestricted and extensive cross-examination of appellant on the circumstances underlying his criminal acts, whether or not they resulted in conviction (T.444-452). It is absurd to regard appellant's cocaine offenses as relevant to honesty but Sarmiento's massive heroin importation as irrelevant. Yet that was precisely the effect of the district court's ruling.

III.

Finally, when it became time for the defense case, the court erred by unduly restricting the direct examination of appellant's character witnesses. Thus, during the testimony of Albert Carlson, a worker for the city Social Services Department, the witness was asked whether he was aware of appel-

lant's reputation for truthfulness and veracity within MCC (T.307). The witness was unable to express a view since he had not talked to others. However, Carlson maintained an opinion about appellant's character for truth and veracity, an opinion he desired and was asked to express, but an opinion he was precluded from mentioning on the basis of the court's ruling, "I just told you you can't form your own opinion, it has to be the opinion of others" (T.556).

That ruling was utterly incorrect. Under Fed.R.Evid. 405(a), proof of character may may be made either by reputation evidence or "by testimony in the form of an opinion." The court's failure to permit examination perfectly proper under Rule 405 is completely unexplained.

IV.

Appellant's claim that Sarmiento had induced him to aid in her escape plans was perfectly credible, and was supported by the testimony of another MCC inmate who had also been approached by Sarmiento. Moreover, appellant was not shown previously to have been engaged in this type of criminal activity, nor was any convincing motive offered for his help in this escape plan. Given his trusted status in the institution and his demonstrated resistance to escape pleas offered by other inmates, it is inconceivable that he would have played the significant role he did in this escape plan without substantial inducements and pressure applied by Sarmiento, a wit-

ness who had every reason in the world to create cases for the Government. Appellant claimed that Sarmiento applied pressure to him by gaining his friendship and continually begging for his help; Sarmiento denied it. Thus, the critical issues in this case were the nature of the contacts between appellant and Sarmiento and the issue of whom to believe. The court's erroneous rulings restricting examination of Sarmiento on the conversations she had with appellant and her motive to co-operate went to the heart of these contested issues. Taken together or analyzed separately, we submit that the errors were harmful and that reversal of the judgment is therefore required.

Point III

THE CASE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE CONDITIONAL PROMISE OF THE SOUTHERN DISTRICT UNITED STATES ATTORNEY'S OFFICE TO RECOMMEND A TEN-YEAR SENTENCE FOR THE GOVERNMENT WITNESS WAS DEPENDENT IN PART UPON HER COOPERATION IN THE MCC ESCAPE CASE.

In cross-examination of Yolanda Sarmiento, this critical witness was asked whether, in addition to the five to 20-year plea bargain unrelated to the MCC affairs, and the agreement to call her cooperation in the MCC case to the attention of the sentencing judge, there were any other promises made. When the witness denied the existence of any further inducements, she was reminded that at her plea hearing she was promised that if she furnished some "additional" consideration, the Southern District United States Attorney's office might recommend that the court not impose a sentence of greater than 10 years, and further, that if the Eastern District office disagreed with the opinion of the Southern District and refused to make such a recommendation, then Sarmiento could withdraw her plea. Despite the existence of the promise on the record, and Sarmiento's acknowledgment at the plea hearing that she understood what was happening, Sarmiento maintained her position that she did not understand this additional and significant inducement.

Thus it fell upon David DePetris, chief of the narcotics section of the Eastern District United States Attorney's office,

to explain this plea bargain. DePetris testified that the Southern District United States Attorney's office was indeed considering recommending a 10-year sentence in the event that Sarmiento furnished additional cooperation with the Southern District office. However, DePetris twice noted that this "additional" cooperation referred to an entirely unrelated matter, without any connection to MCC. If the jurors accepted this testimony, they could only have concluded that the witness would not feel she had anything to gain from the Southern District United States Attorney's office for her cooperation with that office in the MCC escape case.

Sarmiento was sentenced on January 21, 1977, to a five-year minimum prison term. During the sentencing, it was noted that the Southern District recommendation had not been offered. Mr. Jacobs, Sarmiento's attorney, then expressed his understanding of the 10-year bargain:

> Just to clarify that a little. It was the position of the Southern District of New York that they would not make such a recommendation unless Ms. Sarmiento would cooperate with the escape which she did and assisted with regard to a second activity which because of matters outside her control, never bore any fruition.
>
> (Sarmiento sentencing minutes at 9-10; emphasis added).

This representation flatly contradicts both Sarmiento's statement and that of Mr. DePetris. The existence of such a conflict on the record is all the more surprising when it is remembered that Mr. DePetris was the Assistant United States

Attorney present at Sarmiento's sentencing. Yet, when Jacobs proffered an understanding of the Southern District recommendation directly at odds with DePetris' testimony at appellant's trial, DePetris made no effort to dispute it.

Of course, if the Southern District had stated that its conditional promise to recommend a 10-year sentence was dependent in part upon Sarmiento's cooperation in the MCC escape, the jury had a right to know it. See Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264, 269 (1959); see also United States v. Badalamente, 507 F.2d 12, 17-18 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975); United States v. Sperling, 506 F.2d 1323, 1332-1333 (2d Cir.), cert. denied, 420 U.S. 962 (1975). Surely, the jurors should not have been told the converse.

Since there is a conflict in the record as to whether the Southern District promise was contingent in part on Sarmiento's cooperation in the MCC escape case, there must be a remand for an evidentiary hearing in the district court. DeMarco v. United States, 415 U.S. 449 (1974).

Thus, in DeMarco, a witness denied having received any sentence promise; at the sentencing of the witness, the Assistant United States Attorney made certain statements interpretable as indicating that a promise had been made. The Court held that where a factual issue was created regarding the existence of the promise, the issue should have been remanded for a hearing in the district court.

The same resolution is required here. Mr. Jacobs' statement coupled with Mr. DePetris' failure to challenge it creates the factual issue as to the nature of the promise. Accordingly, a hearing must be held in the district court.

CONCLUSION

For the reasons cited in Points I and II, the judgment of the district court should be reversed and the case remanded for a new trial; for the reasons cited in Point III, the case must be remanded for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

APRIL 5, 1977

I certify that a copy of this brief [redacted] has been mailed to the United States Attorney for the Southern District of New York.

David J. Gottlieb